Facts

Burlington Resources, Inc., the largest U.S. independent producer of oil and gas, owns and operates production platforms in the Gulf of Mexico through its subsidiary Burlington Resources Oil & Gas Company LP. Prior to February 2000, the operation and maintenance of the platforms was for the most part performed by Burlington employees.

Early in 1999 Burlington decided to re-structure its North America operations, by combining with Poco Petroleums, Ltd., an owner of proven Canadian natural gas properties with growth potential, while decreasing emphasis on the Gulf of Mexico Shelf, where production was declining. As part of that plan, Burlington executives studying cost-saving alternatives recommended laying off the production employees and "outsourcing" the Gulf of Mexico platform operations to a third party, Baker Energy. Burlington executives conspired with Baker Energy to deprive the Louisiana production hands of approximately $3 Million in severance benefits, while paying $10 Million in severance benefits to "certain Poco executives" in the Canadian merger.

The Plan. In April 1999, Burlington adopted the BRI Discretionary Severance Benefit Plan. The Plan provided that a participant whose employment was terminated by Burlington would be eligible for severance benefits, unless they were offered a Comparable Position by an entity to which a portion of Burlington's functions or geographical operations were "outsourced." The Plan defined a Comparable Position as one for which the annual base pay is at least 90% of a participant's current annual base pay.

The Outsourcing. Sometime after April 1999, a group of Burlington executives including Production Operations Manager James Craddock, began discussing options to reduce costs and operate more efficiently in the Gulf. One of the options that came under consideration was "outsourcing" the operation of Gulf of Mexico facilities to a third party.

This ultimately led to a proposal by Baker Energy to take over and consolidate Burlington platform labor and logistics with other similar Baker operations in the Gulf. The Baker proposal involved the termination of Burlington's offshore production operators. However, it was important that a large number of experienced Burlington hands return to the platforms as Baker employees, in order to achieve "business continuity."

The Interference. Hunter Malson was VP Operations, Gulf Coast Division. He and Craddock recommended that severance benefits not be paid to the terminated workers. There were a number of meetings after that time in whic the subject came up, and each time the answer was that Burlington was not going to pay severance. Why that decision was made will be explained in the following section.

William Usher was Burlington's Vice President for Human Resources and Administration, and the designated severance plan administrator. Usher was present when the operations group recommended that severance benefits not be paid, for reasons of operational continuity. Malson and Limbacher told Usher that as a member of the support group, he should provide assistance to facilitate that result. In his capacity as plan administrator, and as a member of the Benefits Review Committee, Usher would later deny the severance claims.

Discussions between Burlington and Baker continued. In November 1999, Craddock received an email from Keith Revels at Baker Energy with the Baker pay rates for lease production operators Craddock calculated that the Baker annual pay rate for A Operators was less than 90% of the Burlington rate. Craddock suggested that Baker increase the annual pay rate for Operators, so that the workers would be ineligible for severance benefits under the "comparable job offer" provision of the DSB severance pay plan. Baker complied.

On January 19, 2000 HR Manager John Janousek and Craddock were traveling from Houston to Lafayette to announce the layoff. Craddock read aloud Revels' email which stated Baker annual

pay rates for production workers. Janousek realized that under the revised Baker job offers, the employees would still be eligible for severance benefits under the DSB plan because of the way Baker computed regular hourly pay.

Craddock or Janousek called Baker and told them to change the way they computed regular pay for lease operators, from "straight weeks" to " split weeks", just to prevent severance pay eligibility. The intention and the effect was to disqualify the participants who received Baker offers from receiving severance pay.

The Motive. Randy Limbacher was the ultimate decision maker in this process. He was then in the process of being promoted from Vice President in charge of production in North America, to Vice President in charge of worldwide production. Prior to the January 20 outsourcing announcement, it came to Limbacher's attention that the Baker pay rates would result in severance pay eligibility for some people. Limbacher decided to make sure that the employees did not receive severance pay,

> ".....because I would rather that they stay with the properties for business continuity rather than having a decision to make where they could take cash – cash off the table and be able to just go and take a few months off or whatever."
>
> Limbacher depo., p. 66, Rec. Exh. Vol. 2

His motive was to deprive the workers of that opportunity, to put economic pressure on them to return to the platforms. Operations VP Malson affirmed that sentiment.

Craddock and Janousek were aware of Limbacher's plan when they had Baker change its pay rates, and later when they told Baker to change the way it computed regular hourly pay. Malson described the plan as a consensus among himself, Craddock and Limbacher.

BRI officials interfered with the participants eligibility for severance benefits under the Discretionary Severance Benefit Plan. BRI conspired with Baker Energy to manipulate Baker's pay offers, and subsequently had Baker change the way it computed its hourly pay rates, in order to prevent the attainment of eligibility for severance benefits which otherwise would have occurred under Baker's pay plan. Limbacher admitted his motive was to deprive the employees of the economic benefit to put economic pressure on them to return to work on BRI's platforms. This is precisely the sort of willful interference which ERISA §504 was designed to prevent.

1. **The Interference Claim**

The Fifth Circuit found Burlington's requirement that Baker Energy change its pay plan in order to prevent the attainment of severance benefits was not prohibited interference, because the payment of severance would result in a "negative incentive" for the employees to remain employed. The Court deemed the goal of business continuity sufficient justification for Burlington's actions.

The Fifth Circuit held:

> "As Appellants were entitled to no existing enforceable rights, they were required to show that BRI's actions were taken for the purpose of interfering with which Appellants might thereafter become entitled under the plan in question. Based on the essentially undisputed facts of this case, the district court correctly concluded that the actions taken by and on behalf of BRI were not taken for the purpose if interfering with rights to which they might have become entitled. To the contrary the actions were legitimately taken to ensure the continued and uninterrupted employment of Appellants by Baker Energy, BRI's successor in the Gulf of Mexico activities, both in terms of structure and amount of compensation.

> That BRI was also motivated by its non-discriminatory desire to avoid a break in service for those experienced personnel that could result from unintended and unwarranted severance payments is of no moment.
>
> Avoiding the inadvertent creation of a negative incentive for Appellants' continued, uninterrupted work when changing employers from BRI to Baker Energy does not constitute purposeful interference with obtaining benefits to which Appellants had no current entitlement or expectation of future entitlement if hired without a break in service by Baker Energy."
>
> *Appendix*, Fifth Circuit Opinion, p. 3.

Since it is undisputed that the participants would have become entitled to severance benefits but for Burlington's manipulation of Baker's pay plan, and BRI officials admitted their object was to prevent the attainment of eligibility for severance pay, the Fifth Circuit's conclusion that there was "no purposeful interference" was, more accurately, that the interference which did occur was permissible in view of the business objective.[2]

The Fifth Circuit's holding that an employer may take action to prevent the attainment of eligibility for ERISA plan benefits if to do so

---

[2]The Fifth Circuit also endorsed the District Court's view that the participants had no "entitlement" worthy of protection against interference because they had "no expectation of future entitlement if hired without a break in service by Baker Energy". Appendix, Fifth Circuit Opinion, p. 3. This conclusion was clearly wrong, as it was undisputed that the participants would have become eligible for severance benefits but for the manipulation of the Baker pay plan, even if they were hired by Baker with no break in service. An entitlement includes a right to which a participant may become entitled under the terms of a plan. 29 USCA §1140, Intermodal Rail Employees Assn. v. Atchinson, Topeka & Santa Fe Ry., 520 U.S. 510, 514, 117 S.Ct. 1513, 1515, 137 L.Ed.2d. 763 (1997). Bodine v. Employer's Cas. Co., 352 F.3d 245 (5th Cir. 2003). Burlington admitted these participants would have been eligible for benefits under the terms of BRI's severance plan as a result of the outsourcing, had Burlington not taken affirmative action (twice) to alter Baker's pay plan to prevent that result.

serves a legitimate business interest, conflicts with prior rulings of the Fifth Circuit, and with decisions from other circuits, which uniformly hold that a desire to prevent the attainment of eligibility for severance benefits coverts an otherwise permissible employer action into prohibited interference. The decision below also conflicts with the Supreme Court's holding in Intermodal Rail Employees Assn. v. Atchinson, Topeka & Santa Fe Ry., 520 U.S. 510, 514, 117 S.Ct. 1513, 1515, 137 L.Ed.2d. 763 (1997). ERISA's prohibition against interference protects rights about to be earned but frustrated due to unlawful employer action. An employer's right to withhold a benefit does not allow it to require a pay adjustment as to interfere with the employee's attainment of a future benefit

It was abundantly clear from the testimony of BRI officials that BRI conspired with Baker Energy to manipulate Baker's pay offers, and later had Baker change the way it computed regular hourly pay, specifically to prevent the attainment of eligibility for severance benefits which otherwise would have occurred. Officials at the highest level admitted their motive was to deprive the employees of severance pay in order to put economic pressure on them to return to work on BRI's platforms. This is precisely the sort of willful interference which ERISA §504 was designed to prevent.

The Fifth Circuit's conclusion that the end justifies the means has been rejected by the Supreme Court, and by other circuits who have considered the question. When loss of benefits is itself a motive behind the employer's action, and not a mere consequence of it, the claimants are entitled to judgment for interference. A motive to prevent benefits from ripening converts an otherwise permissible employer action into a violation of ERISA §510. Pickering v. USX Corp., 809 F.Supp 1501, 1535 (D.Utah 1991), citing *Gavalik*, 812 F.2d at 834.

Any action (save mere retention) taken with the specific intent to obstruct eligibility for benefits is prohibited. Bodine v. Employers Casualty, No. 03-20190 (5th Cir. 2003), Unida v. Levy Strauss, 986 F.2d 970, 980 (5th Cir. 1991), Perdue v. BKC, 7 F.3d 1251 (5th Cir. 1993), Bulloch v. Equitable Life, 259 F.3d 395 (5th Cir. 2001),

Simmons v. Wilcox, 911 F.2d 1077, 1081-82, Clark v. Resistoflex, 854 F.2d 762, 770 (5th Cir. 1988).

"Smoking gun" evidence of a motive to prevent benefits from ripening is of course rare. However, in every reported case where such evidence exists, the plaintiffs have prevailed. Millsaps v. McDonnel Douglas Corp., 2003 WL 21277124 (N.D. Okla. 2003), citing *Pickering*, and *Gavalik, supra.* More specifically, altering pay rates in contemplation of a layoff in order to reduce severance participation is prohibited interference. Ahne v. Allis Chalmers Corp., 640 F.Supp 912, 920 (E.D. Wis. 1986), citing Kross v. Western Elec. Co., Inc., 701 F.2d 1238 (7th Cir. 1983).

The elements of prohibited interference are (a) an action taken against an employee (b) with the purpose, desire or specific intent to prevent benefits from ripening. Perdue v. BKC, 7 F.3d 1251 (5th Cir. 1993), Bulloch v. Equitable Life Assurance Society of the United States, 259 F.3d 395 (5th Cir. 2001); Simmons v. Willcox, 911 F.2d 1077, 1081-82 (5th Cir.1990); Clark v. Resistoflex Co., 854 F.2d 762, 770 (5th Cir.1988).

Under *Perdue* and *Bodine*, an employer may elect to retain an employee rather than discharging him, so as to avoid paying severance benefits. However under both those cases, once BRI decided to lay off its employees, any action taken with the intent, design or purpose to prevent or interfere with their attainment of eligibility severance pay violated ERISA. Conduct which is designed to prevent rights from vesting is the "core concern" of ERISA §510. Bulloch v. Equitable Life Assurance Society of the United States, 259 F.3d 395 (5th Cir. 2001).

An employer can decide not to offer any benefits at all, and it may modify or terminate non-vested benefits at any time by a plan amendment. However, once the employer decides to offer benefits, it must allow its employees to take advantage of the plan and must administer the plan in a nondiscriminatory fashion. The right to amend or terminate a plan does not allow an employer to interfere with

eligibility or to prevent the employees from taking advantage of the benefits. Garrat v. Walker, 164 F.3d 1249, 1252, 1253 (10th Cir. 1998), Seaman v. Arvida Realty Sales, 985 F.2d 543 (11th Cir. 1993). To excuse this action would prevent § 510 from fulfilling its congressionally intended purpose. *Id.*, 547.

On this point, the testimony was consistent and uncontradicted. After Limbacher made the outsourcing decision in December 1999 and recognized severance pay as a potential hindrance to "operational continuity," non-interference was not an option. There was no thought given to allowing the Baker hiring process and the severance plan to operate unimpeded.

More importantly, the result below directly conflicts with the Supreme Court's holding in Intermodal Rail Employees Assn. v. Atchinson, Topeka & Santa Fe Ry., 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d. 763 (1997), wherein this Court made it very clear that under ERISA the end does not justify the means. A legitimate business object may justify a plan amendment or termination, but cannot justify the employer's circumvention of the unfettered operation of the plan:

> As noted above, (ERISA §510) makes it unlawful to "discharge ... a [plan] participant or beneficiary ... for the purpose of interfering with the *attainment of any right* to which such participant may become entitled under the plan." 29 U.S.C. § 1140 (emphasis added).... Because a "plan" includes an "employee welfare benefit plan," and because welfare plans offer benefits that do not "vest" (at least insofar as ERISA is concerned), Congress' use of the word "plan" in § 510 all but forecloses the argument that § 510's interference clause applies only to "vested" rights. Had Congress intended to confine § 510's protection to "vested" rights, it could have easily substituted the term "pension plan," see 29 U.S.C. § 1002(2), for "plan," or the term "nonforfeitable" right, see § 1002(19), for "any right." But § 510 draws no distinction between those rights that

"vest" under ERISA and those that do not. *Intermodal*, 520 U.S. at 514.

The right that an employer or plan sponsor may enjoy in some circumstances to unilaterally amend or eliminate its welfare benefit plan does not, as the Court of Appeals apparently thought, justify a departure from § 510's plain language..... (ERISA) Section 510 counterbalances this flexibility by ensuring that employers do not "circumvent the provision of promised benefits." *Ingersoll-Rand Co.*, supra, 498 U.S., at 143, 111 S.Ct., at 485 (citing S.Rep. No. 93-127, pp. 35-36 (1973); H.R.Rep. No. 93-533, p. 17 (1973). In short, " § 510 helps to make promises credible." *Heath, supra,* at 258. An employer may, of course, retain the unfettered right to alter its promises, but to do so it must follow the formal procedures set forth in the plan. See 29 U.S.C. § 1102(b)(3) (requiring plan to "provide a procedure for amending such plan"); *Schoonejongen, supra,* at 78, 115 S.Ct., at 1228 (observing that the "cognizable claim [under ERISA] is that the company did not [amend its welfare benefit plan] in a permissible manner").

Adherence to these formal procedures "increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve." *Schoonejongen, supra,* at 82, 115 S.Ct., at 1230. The formal amendment process would be undermined if § 510 did not apply because employers could "informally" amend their plans one participant at a time. Thus, the power to amend or abolish a welfare benefit plan does not include the power to "discharge, fine, suspend, expel, discipline, or discriminate against" the plan's participants and beneficiaries "for the purpose of interfering with [their] attainment of ... right[s] ... under the plan."

> To be sure, when an employer acts without this purpose, as could be the case when making fundamental business decisions, such actions are not barred by § 510. But in the case where an employer acts with a purpose that triggers the protection of § 510, any tension that might exist between an employer's power to amend the plan and a participant's rights under § 510 is the product of a careful balance of competing interests, and is most surely not the type of "absurd or glaringly unjust" result, *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 261, 117 S.Ct. 796, 804, 136 L.Ed.2d 736 (1997), that would warrant departure from the plain language of § 510. *Intermodal*, 520 U.S. AT 516.

In other words, when marketplace forces cause an employer to "rethink" an earlier offer of contingent severance benefits, the employer may reduce or eliminate such benefits (by amendment), *so long as the procedure followed is consistent with the plan and the Act*, Wise v. El Paso, 986 F.2d 925 (5th Cir. 1993).

2. Disclosure of the employer's plan to prevent the attainment of eligibility

The Fifth Circuit erred by affirming that an employer and plan administrator have no ERISA fiduciary duty to disclose an arrangement which is designed to prevent the attainment of eligibility for plan benefits. The holding conflicts with Varity v. Howe, 516 U.S. 489, 116 S. Ct.1065, 134 L. Ed. 2d 130 (1996) and McCall v. Burlington Northern Santa Fe, 237 F.3d 506 (5th Cir. 2000).

The District Court found the statement by HR and operations officials "you must interview with Baker in order to be eligible for benefits" was arguably true under a reasonable interpretation of the Plan, and therefore could not be considered misleading or deceptive.

The result is inconsistent with *Varity* because it was deceptive, misleading and unlawful for company officials to hold out the severance plan benefit as an inducement to get the employees to remain on board for the outsourcing. These same officials knew that Burlington did not intend to pay severance benefits, because they themselves had arranged that result with Baker. ERISA does not protect a fiduciary statement that is technically true but misleading and intended to deceive.

The Fifth Circuit decision is in direct conflict with *Varity's* mandate that an employer has a fiduciary duty to disclose material facts when the effect of non-disclosure is to mislead employees about the future of their benefits.

> "To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act "solely in the interest of the participants and beneficiaries." As other courts have held, "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA," *Varity*, 116 S.Ct. at 1074.

The Fifth Circuit also affirmed the District Court's conclusion that the plan administrator did not breach an ERISA fiduciary duty by failing to disclose the scheme, because when acting in concert with his superiors to serve the goal of "business continuity," he was acting as an officer of the company and not in his capacity as plan administrator. *Appendix*, District Court Memo. Rul. p. 17; Fifth Circuit Opinion, p. 3.

There is no question but that the administrator was wearing his ERISA fiduciary hat in those communications, that he was operating under a clear conflict of interest, and that he failed to divulge the real reasons benefits were denied.

When a plan administrator speaks in his fiduciary capacity he must speak truthfully. Varity Corp. v. Howe, 516 U.S. 489, 116 S. Ct.1065,134 L. Ed. 2d 130 (1996) McCall v. Burlington Northern Santa Fe, 237 F.3d 506 (5th Cir. 2000). The BRI Benefits Review Committee acknowledged that the administrator breaches his fiduciary duty to the plan and the participants by affirmatively misleading participants about the operation of the plan, or by remaining silent in circumstances when silence could be considered misleading. (Wm. Usher letter of November 14, 2000, Rec. Exh. Vol. 1), citing Adamczyk v. Lever Bros., 991 F.Supp 931 (N.D. Ill. 1997).

The plan administrator was present when the operations group recommended that severance benefits be withheld, so as to foster operational continuity. He was told that as a member of the support group he should provide assistance to achieve that result. As plan administrator, and as a member of the Benefits Review Committee, he denied the severance claims. The stated reason was the participants received job offers which met the plan definition for comparable positions.

In his response to the severance claims the plan administrator failed to disclose, and by artful language actively concealed that upper management had decided months before the layoff to deny severance benefits for the company's own interest, in order to further the outsourcing scheme, and instructed him to assist in that endeavor.

Later, in the Benefits Review Committee letter denying the administrative appeal, the administrator claimed that the loss of benefits was an "incidental consequence" of the outsourcing, and that BRI's motivation was not to deprive the claimants of benefits. Two of the three Committee members who signed that letter were present when the chief executive announced BRI's intention to deprive the claimants of severance benefits, and the reason for that action. The truth, that one of BRI's fundamental business considerations was to deprive the claimants of severance benefits, was again actively and effectively concealed by Usher.

ERISA §1133 and 29 C.F.R. 2560.503-1(f) require the administrator to provide the specific reason or reasons for denying the claim. ERISA §1021 and §1024(b) require the administrator to furnish participants in summary form a description of "circumstances which may result in disqualification, ineligibility or denial or loss of benefits." Certainly, management's decision that no severance benefits would be paid, months before the layoff was announced, together with the actions taken by the BRI officials to realize that result, constituted circumstances which were designed to result in disqualification, ineligibility and denial or loss of benefits. Usher breached his fiduciary duty by failing to disclose those circumstances, and affirmatively misleading the participants about the real reason benefits were denied

On almost identical facts another panel of the Fifth Circuit held an employer does breach a *Varity* fiduciary duty by failing to reveal its plan to cause the participants to become ineligible for severance benefits in order to keep them "on board" for a planned divestiture Kergosian v. Ocean Energy, 2004 WL 2451351 (5th Cir. 2004).

> "This court has also held 'that an employer, if it chooses to communicate about the future of a participant's plan benefits, has a fiduciary duty to refrain from misrepresentations. *Martinez*, 338 F.3d at 424. Further, 'when an employer *speaks to the future* of a plan, employees are justified in concluding that it is backed by the authority of a plan administrator, and should therefore be entitled to trust in those representations.' *Id.* at 425, (Emphasis added.) Even though *Martinez* was decided subsequent to the arbitrator's award, it is based on Supreme Court precedent argued to and reviewed by the arbitrator. See Varity Corp. v. Howe 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996)..."

> "That fiduciary duty required that the Committee refrain from knowingly and significantly deceiving the beneficiaries in order to save the employer money. *Id.*

In *Kergosian* the Fifth Circuit previously rejected the premise adopted by the panel in this case, e.g. that Burlington's conduct may be excused if it had a legitimate business interest or "right" to cause Baker to make comparable job offers. In *Kergosian* the employer had a similar legitimate business interest in avoiding a business interruption during a merger and sale of its offshore business unit. The employer certainly had a right to amend the plan to deprive the participants of their benefits if it viewed the payment of severance as a "negative incentive" for retention. Nevertheless the Fifth Circuit panel held in *Kergosian* the employer's failure to disclose its intention to make the employees ineligible for severance in an effort to keep them "on board" for the outsourcing was a clear breach of fiduciary duty which justifies an award of benefits. *Id.*

The Fifth Circuit held in this case that an employer's interest in keeping employees on board during an outsourcing and to avoid business interruption justified actions by the employer which were designed to prevent the employees' attainment of eligibility for ERISA severance benefits, to which the participants would otherwise have become entitled.

CONCLUSION

The holding of the Fifth Circuit conflicts with the Supreme Court's holding in Intermodal Rail Employees Assn. v. Atchinson, Topeka & Santa Fe Ry., 520 U.S. 510, 514, 117 S.Ct. 1513, 1515, 137 L.Ed.2d. 763 (1997) and decisions from other circuits which uniformly hold that a desire to prevent the attainment of eligibility for severance benefits coverts an otherwise permissible employer action into prohibited interference.

The Fifth Circuit also affirmed that an employer has no ERISA fiduciary duty to disclose changes in an outsourcing pay plan that are designed to cause severance benefits ineligibility. This directly conflicts with Varity Corp. v. Howe, in which this Court held that an employer has a fiduciary duty to disclose material facts when the effect

of non-disclosure is to mislead employees about the future of their benefits.

Review is warranted to secure and maintain uniformity of decision, and to avoid confusion or uncertainty with respect to important ERISA policy concerns, including (i) the definition of an entitlement worthy of protection against interference, and (ii) the scope of an ERISA fiduciary's duty of honest disclosure as to the employer's intention to avoid paying benefits.

For the foregoing reasons, Applicants respectfully pray that this petition for writ of certiorari be granted.

RESPECTFULLY SUBMITTED:

CHRISTOPHER L. ZAUNBRECHER
(#09546)
413 Travis Street
Post Office Drawer 51367
Lafayette, Louisiana 70505-1367
Telephone: (337) 237-4070
Facsimile: (337) 233-8719

Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was placed in the U.S. mail, postage prepaid and properly addressed to the following, on this 22nd day of June, 2005, in Lafayette, Louisiana:

Mr. Gregory R. Mier
Mr. Greg Guidry
The Onebane Firm
102 Versailles Blvd. - Suite 600
Post Office Drawer 3507
Lafayette, LA 70502-3507
Phone: (337) 237-2660

Mr. Fraser A. McAlpine
Akin Gump Strauss Hauer & Feld LLP
1111 Louisiana Street
44th Floor
Houston, Texas 77002
Phone: (713) 220-8129

/s/
CHRISTOPHER L. ZAUNBRECHER (#09546)

APPENDIX

U. S. COURT OF APPEALS
F I L E D Mar 24 2005
Charles R. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-30895

DWAYNE BELAIRE; JOHN BELCHER;
WADE BONDS; BOBBY W BUTLER;
CLARENCE E. CANNON; ET AL

Plaintiffs - Appellants

v.

BURLINGTON RESOURCES INC;
BURLINGTON RESOURCES INC. DISCRETIONARY
SEVERANCE BENEFIT PLAN

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING EN BANC

(Opinion 2/23/05, 5 Cir.,_____ F.3d _____)

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM :

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jacques Wiener
United States Circuit Judge

Judge Clement did not participate in the consideration of the petition for rehearing en banc.

U. S. COURT OF APPEALS
Fifth Circuit
F I L E D February 23, 2005
Charles R. Fulbruge III, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30895
Summary Calendar

DWAYNE BELAIRE; JOHN BELCHER;
WADE BONDS; BOBBY W. BUTLER;
CLARENCE E. CANNON; ET AL,

Plaintiffs-Appellants,

versus

BURLINGTON RESOURCES, INC.;
BURLINGTON RESOURCES, INC.
DISCRETIONARY SEVERANCE
BENEFIT PLAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(6:01-CV-786-RFD-MEM)

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

In this ERISA case, Appellants appeal the district court's rejection of their claims for severance benefits under Appellee Burlington Resources, Inc.'s ("BRI") Discretionary Severance Benefit Plan ("Severance Plan") in connection with BRI's outsourcing its platform labor and logistics operations in the Gulf of Mexico to a third party ("Baker Energy"). More specifically, Appellants (BRI employees whom the district court previously held not entitled to benefits under BRI's Change in Control and Employee Severance Protection Plan), alternatively sought benefits from the Severance Plan. They contend that -- despite their ineligibility for benefits under the literal terms of the Severance Plan -- they are nevertheless owed benefits under that plan because (1) the actions of BRI constituted "interference" with their rights to obtain benefits, in contravention of 29 U.S.C. § 1140 ERISA § 510); and (2) specified management personnel of BRI and the Plan Administrator breached their fiduciary duties to Appellants in violation of 29 U.S.C. § 1104. Appellants also appeal the district court's denial of statutory penalties under 29 U.S.C. § 1132(c) for the alleged fiduciary breaches. For essentially the same reasons extensively and patiently set forth by the district court in its Ruling filed on July 23, 2004, we affirm.

We have carefully reviewed the briefs and other filings of counsel, the record in this case, including the applicable plan documents, and the aforesaid Ruling of the district court. As a result, we are convinced that the claims of Appellants are without merit.

First, Appellants' interference claim under § 510 of ERISA cannot overcome the analysis and holding of Bodine v. Emplrs. Cas. Co.[1]. Appellants have failed to show that BRI somehow took prohibited action for the purpose of interfering with Appellants' attainment of any right to which they were entitled. As Appellants were entitled to no existing enforceable rights, they were required to show that BRI's actions were taken for the purpose of interfering with rights to which Appellants might thereafter become entitled under the plan in question. Based on the essentially undisputed facts of this case, the district court correctly concluded that the actions by and on behalf of BRI were not taken for the purpose of interfering with rights to which

[1] 352 F.3d 245 (5th Cir. 2003).

they might have become entitled. To the contrary, the actions were legitimately taken to ensure continued and uninterrupted employment of Appellants by Baker Energy, BRI's successor in the Gulf of Mexico activities, both in terms of structure and amount of compensation. That BRI was also motivated by its non-discriminatory desire to avoid a break in service for these experienced personnel that could result from unintended and unwarranted severance payments is of no moment. Avoiding the inadvertent creation of a negative incentive for Appellants' continued, uninterrupted work when changing employers from BRI to Baker Energy does not constitute purposeful interference with obtaining benefits to which Appellants had no current entitlement or expectation of future entitlement if hired without a break in service by Baker Energy. Under these circumstances, the reasoning and holding of our opinion in Bodine bars a determination of actionable "interference" within the intendment of § 510 of ERISA.

Furthermore, in light of the unique nature of fiduciary relationships under ERISA, which recognizes that fiduciaries can wear "two hats," a simple test of undivided loyalty is inapt. Absent any showing of deceptive practices, misrepresentations, or other untoward acts, the Appellants' fiduciary breach claims miss the mark entirely. We need not waste judicial resources or paper in reiterating the detailed analysis and conclusion so ably provided by the district court in its eminently correct Ruling.

Finally, given our affirmance of the district court's rejection of Appellants' substantive claims for interference and for breach of fiduciary duty, they have no viable basis of entitlement to statutory penalties under 29 U.S.C. § 1132(c). We affirm the district court's rejection of this claim as well.

The district court's Final Judgment, filed August 11, 2004 on the basis of its aforesaid Ruling, is, in all respects, AFFIRMED.

FILED
USDC, WESTERN DISTRICT OF LA.
ROBERT H. SHEMWELL, CLERK
DATE: 7/23/2004
BY: MS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

DWAYNE BELAIRE, ET AL	CIVIL ACTION NUMBER: 01-0786
VERSUS	JUDGE DOHERTY
BURLINGTON RESOURCES, INC.	MAGISTRATE JUDGE METHVIN

RULING

This matter comes before the Court on what are styled "Cross-motions for Summary Judgment," but will be treated by this Court as submissions on the briefs by the parties pursuant to this Court's ERISA Case Order, which reflects an agreement of all counsel that this case is governed by ERISA. This Ruling will be the second ruling made by this Court in this matter addressing BRI's Master Plan. Doc. #118. This Court previously ruled, on April 6, 2004, [Doc. #126] plaintiffs were not entitled to benefits under BRI's "Change in Control Employee Severance Protection Plan ("CIC Plan"), also, a component of BRI's Master Plan.

Plaintiffs now seek benefits under the second portion of BRI's Master Plan, the BRI Discretionary Severance Benefit Plan (the "Severance Plan"), arguing that, although under the literal terms of BRI's Severance Plan, plaintiffs are not entitled to benefits, they are, nonetheless, entitled to benefits from BRI under BRI's Severance Plan, as (1) BRI "interfered" with plaintiffs' right to benefits under BRI's Severance Plan, arguing ERISA § 510, 29 U.S.C. § 1140 as their basis.

Plaintiffs also, argue defendant's Plan Administrator and BRI's management (2) breached their fiduciary duty owed pursuant to 29 U.S.C. § 1104; and (3) therefore, plaintiffs are entitled, based on the breach of fiduciary duty, to statutory penalties under 29 U.S.C. § 1132(c) for those claimed breaches of fiduciary duty by the Plan Administrator and BRI management. All of plaintiffs' claims arise out of an event which will be explained further, infra, but will be referred by this Court as the "Burlington/Baker Outsourcing Transaction."

This matter had been bifurcated by Court and agreement of counsel. Discussions with counsel memorialized in this Court's February 11, 2004 Minute Entry [Doc. #118], and its previous ruling of April 6, 2004 [Doc. #126], address the bifurcation. All counsel agreed a finding by this Court that plaintiffs were entitled to benefits under the terms of the BRI's CIC Plan, would have obviated the need for this Court to rule on plaintiffs' claims based on BRI's Severance Plan. However, in the April 6, 2004 Ruling, this Court determined plaintiffs' had no right to benefits under the terms of BRI's CIC Plan. Thus, plaintiffs' claims under BRI's Severance Plan are now at issue. Plaintiffs admit they are not entitled to benefits under the terms of the Plan, itself, but claim they are nonetheless due benefits under that Plan because of defendant's "interference" as addressed in § 1140 and defendant's breach of fiduciary duty addressed under § 1104.

Although the parties have styled the competing motions as summary judgments, counsel also, have submitted the Administrative Record, which includes those depositions which were allowed by this Court in limited discovery pursuant to plaintiffs' claim couched under § 1140; and therefore, as this matter arises under ERISA and all evidence of the administrative record are now before the Court, the matters are more properly couched as submissions on briefs. *See* Minute Entry [Doc. #118]; Ruling [Doc. #126].

Although an ERISA claim, this Court it not asked to determine whether benefits were owed under the provisions of the Plan at issue, plaintiffs admit they were not entitled to benefits under the terms of BRI's Severance Plan, but this Court is asked to address jurisprudence interpreting 29 U.S.C. § 1140 arguing interference with plaintiffs' rights to benefits and/or § 1104, a breach of fiduciary duty owed. Therefore,

this Court's determination will be a *de novo* review of the facts as agreed to by the parties and stated below.

Facts

Both parties have submitted Statements of Undisputed Facts, plaintiffs also have submitted a Revised Statement of Undisputed Facts. BRI, in their response to plaintiffs' Statement of Undisputed Facts, agreed with plaintiffs "that there are no issues of fact for the Court to resolve in a trial of plaintiffs' claims concerning the Discretionary Severance Benefit Plan.... Indeed, Defendants believe that the facts cited by Plaintiffs demonstrate that Defendants did not engage in any conduct that violated § 510 of ERISA, 29 U.S.C. § 1140." Response to Plaintiffs' Undisputed Facts, p. 1. [Doc. #90]

However, BRI further states: "[n]otwithstanding their agreement with the basic facts, Defendants believe that Plaintiffs have mis-characterized four of those statements of fact. While the four statements of fact are generally undisputed, Plaintiffs' characterization of them is both argumentative and misleading." BRI's Statement of Undisputed Fact, pp. 1, 2. [Doc. #90][1]

Accordingly, this Court noted the rather convoluted submissions, nonetheless couched as "undisputed."[2]

1. Exhibit 1 is a true and correct copy of Burlington Resources, Inc.'s Discretionary Severance Benefit Plan. The Plan provided that a participant whose employment was terminated by Burlington would be eligible for

---

[1] This statement was made in response to plaintiffs' original Statement of Undisputed Facts. Defendants also filed a Supplemental Statement of Undisputed Facts in response to plaintiffs' "Revised" Statement of Undisputed Facts, [doc. #91, which will be referenced, infra.

[2] In the original response of BRI to plaintiffs' original Statement of Undisputed Facts these four "mis-characterizations" as claimed by BRI are numbered 12, 26, 30 and 31. The Supplemental Statement of Undisputed Facts, filed by defendants, reflects these four "mis-characterizations" now correspond to numbers 10, 24, 28 and 29 in plaintiffs' "Revised" Statement of Undisputed Facts.

severance benefits, unless they were offered a Comparable Position by an entity to which a portion of Burlington's functions or geographical operations were "outsourced."

2. The Plan defined a Comparable Position as one for which the annual base pay is at least 90% of the participant's current annual base pay.

3. Sometime after April, 1990, a group of Burlington employees that included Production and Operations Manager, James Craddock, began discussing options to reduce costs and operate more efficiently in the Gulf.

4. One of the options that came under consideration was "outsourcing" of the operation of Gulf of Mexico facilities to a third party.

5. This ultimately led to a proposal by Baker Energy to take over and consolidate Burlington platform labor and logistics with other similar Baker operations in the Gulf.

6. The Baker proposal involved a termination of Burlington's offshore production operators.

7. The ultimate decision maker in the outsourcing process was Randy Limbacher, Vice-President in Charge of Production in North America.

8. In order to achieve "business continuity," it was important to Limbacher that a large number of Burlington employees returned to the platforms as Baker employees.

9. It came to Limbacher's attention that proposed Baker job offers to Burlington employees would result in severance eligibility for some people.

10. Plaintiff's statement, "Limbacher wanted to prevent the workers from having severance pay, so that they did not have the option to take a few months off to look for employment elsewhere."

Defendant's statement, "It is undisputed that Limbacher did not expect that Burlington would incur significant severance pay, and it is also undisputed he wanted Baker Energy to retain Plaintiffs' services. The issue is not whether Limbacher 'wanted' BR to incur expenses for severance pay, but rather whether he understood that, under the terms of the Discretionary Plan and giving Baker's willingness to extend comparable offers, most or all of the Plaintiffs would not qualify for severance pay."

11. Hunter Malson was VP Operations, Gulf Coast Division.

12. Malson also recommended that the workers not receive severance pay, because they might take the severance pay rather than coming back to work for Baker.

13. William Usher was Burlington's Vice-President for Human Resources and Administration and the designated severance plan administrator.

14. Usher was present when the operations management group recommended that severance benefits not be paid, for reasons of operational continuity.

15. Malson and Limbacher told Usher that as member of the support group, he should provide assistance to facilitate that result.

16. Usher's boss, Vice-President for Law and Administration, David Hanower, and General Counsel, Rick Plaeger, were present when that occurred.

17. In November, 1999, Craddock received an email from Keith Revels at Baker Energy with the Baker pay rates for lease production operators.

18. Craddock calculated that the Baker annual pay rate for A Operators was less than 90% of the Burlington Rate.

19. Craddock suggested that Baker increase the annual pay rate for operators, so that Baker offers to Burlington hands would qualify as "comparable job" offers under Burlington's severance pay plan.

20. Baker complied with Craddock's request.

21. On or about January 9, 2000, HR Manager Janousek told Craddock that under the terms of Burlington's severance plan, and Baker's "straight week" method of calculating pay rates, the Burlington workers who received Baker's offers would be eligible for severance benefits.

22. Either Craddock or Janousek called Baker and advised them to change the pay structure for lease operators to "split week" hourly pay rates.

23. Baker complied with the request.

24. The intent and the effect was to disqualify the participants who received Baker offers from receiving severance pay.

Defendant's statement, "[a]s stated above, Burlington's intent was to retain Plaintiffs' services for both their benefit and the benefit of the Company. If that occurred, Plaintiffs would not qualify for severance benefits and perforce Burlington would not incur that expense. Further, Plaintiffs' reference to 'their severance pay' is misleading. Plaintiffs were never entitled severance pay

because they never qualified for severance pay under the terms of the Discretionary Severance Benefit Plan."

25. As Plan Administrator, and as a member of the Benefits Review Committee, William Usher denied the severance claims.

26. The reason given by Usher for denying the claims was that the participants received job offers which met the Plan definition for comparable positions.

27. In the claim denial, and in the Benefits Review Committee letter denying the administrative appeal, Usher said that the Company was not motivated by a desire to deprive the Claimants of any benefits.

28. Two of the three members of the Benefits Review Committee (Usher, and David Hanower) were present when Limbacher and Malson announced management's intention to deprive these participants of their severance benefits, and instructed Usher to assist in that.

Defendant's statement, "Limbacher intended to insure that Plaintiffs had the opportunity for continued employment on terms comparable to those Burlington provided. If Baker Energy offered Plaintiffs a Comparable Position, that Plaintiff not also receive severance pay. Plaintiffs, however, never had a right or entitlement to severance pay. Therefore, it is misleading to characterize Limbacher's actions and comments with respect to the Benefits Review Committee as 'depriv[ing] these participants of their severance benefits.' Because none of the Plaintiffs qualified for severance pay, Burlington never deprived them of that benefit."

29. As Plan Administrator, Usher knew and failed to disclose to the participants that upper management had decided months earlier to deny severance benefits in

order to enhance the company's prospects for operational continuity.

Defendant's statement, "Burlington's decision was to ensure that Plaintiffs had an opportunity for continued employment. A consequence of continued employment was the disqualification for severance pay. That incidentally reduced the expense of severance pay in the outsourcing deal with Baker. The decision was not to 'deny severance benefits,' as plaintiffs erroneously state, but instead an understanding minimal severance would be owed because of the structure of the transaction with Baker Energy."

In defendant's Supplemental Statement of Undisputed Facts, defendants state:

The facts listed below are intended to supplement Plaintiffs' Revised Statement of Undisputed Facts.

30. During a meeting on or about January 20, 2000, BR representatives told employees that they would not qualify for severance benefits unless they interviewed with Baker Energy.

31. Baker Energy did not offer a comparable position to every BR employee it interviewed as part of the outsourcing transaction.

32. BR provided plaintiffs with: (1) Minutes of the October 19, 2000 meeting in which the Benefits Committee upheld the Plan Administrator's decision to deny plaintiffs' request for benefits; (2) the Power Point presentation that Burlington's lawyer made to the Benefits Committee; (3) the source materials reviewed by the Benefits Committee, which included the Plan Administrator's initial determination and the documents the Administrator reviewed; and (4) a copy of an email

regarding the compensation Baker would offer Burlington employees.

Burlington Resources Inc.'s Discretionary Severance Benefit Plan

Cited below are the relevant terms of BRI's Severance Plan effective April 1, 1999. Exh. 1.

SECTION 2. BENEFITS

2.1 **Eligibility for Benefits.** Subject to the terms and conditions set forth in this Plan, a Participant will be eligible to receive the severance benefits under this Plan on or following the Participant's Termination Date if (a) The Senior Vice President, Law and Administration or the Vice President, Human Resources and Administration, determines, in his or her sole discretion, that the Participant is entitled to benefits under this Plan, or (b) the Participant's employment is terminated by an Affiliated Company, on or after April 1, 1999 and before the termination of this plan set out in Section 4.3 and due to (i) the elimination of the Participant's job or position *or* (ii) a reduction in force.

Notwithstanding foregoing or any other provision in this Plan to the contrary, this Plan and its benefits shall not be available and shall not apply to any Participant who ... (vii) is offered a Comparable Position by an entity to which a portion of the Company's (BRI) properties, assets, functions, departments, facilities or geographical operations are out-sourced whether such out-sourced company is partially owned or unaffiliated, (viii) is offered a Comparable Position by an entity to which a portion of the Company's properties, assets, facilities, plants, operations or geographical areas are sold or transferred (ix) is eligible for severance or change of control benefits under any other severance or change of control plan of an Affiliated Company, ...

Notwithstanding any provision of this Plan to the contrary, a Participant shall not be entitled to any benefits under this Plan

unless the Participant executes (and does not revoke) the then current form of Burlington Resources Severance Agreement and Release provided to the Participant by the Affiliated Company.

. . .

2.3 **Adjustments.** Notwithstanding any other provisions of this Plan, the Plan Administrator has the right in his or her sole discretion to increase, on an individual or group basis, any severance benefits described in Section 2.2 with respect to a Participant who otherwise would be eligible for benefits under Section 2.1.

SECTION I. DEFINITIONS

. . .

1.2 *Base Pay* means the Participant's annual base pay and does not include bonus, equity grants, premium pay, shift differential, incentive pay, overtime or any other additive to base pay under any program or plan.

. . .

1.4 *Comparable Position* means a position for which (a) the Participant is reasonably trained or qualified and (b) the annual base pay is at least 90% of the Participant's current annual base pay.

. . .

1.9 *Plan Administrator* means the person designated to administer the Plan pursuant to Section 3.1.

. . .

SECTION 3. ADMINISTRATION

3.1 **Plan Administrator.** The Company's Benefits Committee or its duly authorized designate shall be the Plan Administrator of this Plan and have the duties and authority stated in 3.2. –

. . .

SECTION 4. AMENDMENT, TERMINATION AND RESERVATION

4.1 **Amendment and Termination.** The Company (by action of (a) its Board of Directors or (b) the Benefits Committee) reserves the right at any time, and from time to time, to amend any or all of the provisions of the Plan or terminate the Plan, in whole or in part, for any reason and without the consent of any person, provided that the benefits to which any Participant has become entitled to benefits by execution of and not revoking a properly presented and approved Severance Agreement and Release on or before the effective date of such amendment or termination shall not be adversely affected without the written consent of the affected Participant. Any amendment, including an amendment terminating the Plan, shall be executed in writing. Nothing in this Plan shall be construed to require continuation of this Plan with respect to existing or future Participants. This Plan may be altered, amended, suspended or changed at any time and from time to time without advance notice to any person.

. . .

4.3 **Automatic Termination.** Unless terminated earlier pursuant to Section 4.1, this Plan shall automatically terminate on December 31, 2001.

. . .

5.8 **Governing Law.** This Plan shall be construed in accordance with applicable federal law and the venue for resolution of any dispute will be in the City of Houston, Harris County, Texas.

5.9 **Disclosure to Participants.** Each Participant shall be advised of the general provisions of the Plan and, upon written request addressed to the Plan Administrator, shall be furnished any information requested regarding the Participant's status, rights and privileges under the Plan as may be required bylaw.

"Interference" Pursuant to 29 U.S.C. § 1140
With Respect to the Burlington/Baker Outsourcing Transaction

ERISA § 510, 29 U.S.C. § 1140 states in relevant part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan.... or for the purpose of interfering with the attainment of any right to which such a participant may become entitled under the plan.

29 U.S.C. § 1140.

The Fifth Circuit in Bodine v. Emplrs. Cas. Co., 352 F.3d 245 (5th Cir. 2003) states as follows:

To sustain a valid § 510 claim (29 U.S.C. § 1140), a employee must show (1) prohibited (adverse) employer action (2) taken for the purpose of interfering with the attainment of (3) any right to which the employee is entitled. See Vanzant v. Todd Shipyards Corp., 847 F. Supp. 69, 72 (S.D. Tex. 1994) with a footnote.

> Section 510 also applies to adverse actions taken for the purpose of interfering with rights "to which the participant may become entitled under the plan." The Employees' only possible hope lies in this language as they clearly had no

> *existing* enforceable rights to Enhanced Benefits.

(emphasis added).

As in Bodine, plaintiffs concede that they are not entitled to severance benefits under the terms of BRI's Severance Plan, just as the employees in Bodine "clearly had no existing *enforceable* rights." (emphasis added). Therefore, as in Bodine, this Court must find an adverse action taken by BRI for the purpose of interfering with rights "to which such a participant may become entitled under the plan." The Court in Bodine further states:

> This Court held in Perdue v. Burger King Corp., 7 F.3d 1251 (5th Cir. 1993) that "[t]he prohibitions under the statute do not extend *per se* to an employer who retains an employee so as to avoid payment of severance benefits under an ERISA plan." 7 F.3d at 1251. That is, there must be some unscrupulous conduct or intentional act (such as harassment or nefarious inducement to stay) on the part of the employer. Id... . Moreover, ERISA does not require an employer to calculate various employee's gains and losses upon termination, and/or to terminate *all* employees at a given benefit level. *See* Vanzant, 847 F.Supp. at 72. (510 is designed to prevent "unscrupulous employers from discharging or harassing their employees").

Further Bodine instructs on the issue of "entitlement" which this Court finds applicable to the issue at hand:

> Finally, it appears that the Employees neither had nor would have become entitled to any right such that a § 510 could come into play in the first place. This requirement for "entitlement" to a § 510 action is only satisfied if the employer has promised the employee a benefit that is eventually denied. McGann v. H&H Music Co., 946 F.2d 401, 405 (5th Cir. 1991).

In Bodine, the Employees argued their employer's failure to terminate the Employees to allow them to obtain Enhanced Benefits from the company was "interference" under 29 U.S.C. § 1140. In the instant case, plaintiffs assert the steps taken by BRI to assure the possibility of continued employment with Baker, i.e., that employees of BRI were offered job benefits commensurate with the 90% definition of "Comparable Position" contained in BRI's Severance Plan, was also "interference" under § 1140, and thus, plaintiffs should be entitled to severance benefits.

In Bodine, the Court noted § 510, 29 U.S.C. § 1140, only creates a cause of action for "interference" with a right or "entitlement" under an employee benefit plan. Therefore, a claimant must show both "unscrupulous conduct" and denial of a right or entitlement. In the instant case, BRI argues, and this Court agrees:

> BR never promised the plaintiffs that they would receive severance pay when they left the Company's employ, and accordingly, have no "entitlement" to severance benefits. Instead, BR promised it would pay severance pay under certain specified circumstances, just as the employer in Bodine promised to provide enhanced early retirement benefits under certain circumstances. Just as the employer in Bodine never promised it would terminate it employees during the "window period," BR never promised to lay off plaintiffs without a comparable offer. Without such a promise, Plaintiffs cannot show any "entitlement" and § 510 does not "come into play in the first place."

Bodine at 251.

BRI further elaborates on the cited Fifth Circuit case of McGann and states:

> In McGann, the Fifth Circuit stated that "[t]he right referred to in the second clause of § 510 is not simply any right to which an employee may conceivably become entitled, but rather any right to which an

> employee may become entitled pursuant to an existing, enforceable obligation." 946 F.2d at 405. Because "defendants broke no promise to McGann," they did not violate § 510. Here, BR promised to pay severance benefits to plaintiffs if they did not receive offers for a comparable position, it did not promise that it would not request an out-sourcing company to extend such offers.
>
> This Court agrees with defendants:
>
> BR's promise as expressed in the Discretionary Plan was to provide severance pay to employees who lost their job as a result of outsourcing only if they did not receive the offer of a Comparable Position as defined in the Discretionary Plan. BR never promised to refrain from encouraging a staffing company like Baker Energy to make comparable offers and never promised to use a "hands off" approach in the process. Accordingly, to prove interference, Plaintiffs must show that they were entitled to severance pay (i.e., they did not receive an offer for a Comparable Position), but BR took action against them to prevent them from receiving their severance pay. They cannot prevail simply by arguing that they would have preferred to have been laid off, but BR arranged for continued employment.

Defendant's Brief in Response, pp. 15-16.

Accordingly, based on Fifth Circuit jurisprudence and this Court's review of the record, this Court finds no basis for plaintiffs' claims of "interference" pursuant to ERISA § 510,29 U.S.C. § 1140. This Court finds controlling the Fifth Circuit opinion in Boding, which found no violation of § 510, 29 U.S.C. § 1140, for an Employer's decision not to terminate employees, thus granting them Enhanced Benefits. Therefore, BRI's decision to seek to provide continuing employment to its employees as a component of the outsourcing of its offshore production activities via the Baker/Burlington Outsourcing Transaction and request Baker Energy offer the BRI employees positions with a salary comporting with the definition of "Comparable

Position" in BRI's Severance Plan, would also not constitute interference pursuant to § 510 of ERISA, 29 U.S.C. § 1140. Therefore, this Court finds in favor of BRI on plaintiffs' claims pursuant to § 510 of ERISA, 29 U.S.C. § 1140, finding that no "interference" took place with respect to the Burlington/Baker Outsourcing Transaction.

Breach of Fiduciary Duty Pursuant to 29 U.S.C. §1104(a)(1)(A)
William Usher

Plaintiffs also, allege William Usher, BRI's Vice-President for Human Resources and Administration and the designated Severance Plan Administrator, engaged in a "conspiracy" with James Craddock and John Janousek, BRI Management, to deny plaintiffs severance benefits, and thus, breached their fiduciary duty under ERISA, § 404(a)(1), 29 U.S.C. § 1104(a)(1).

Twenty-nine U.S.C. § 1104(a)(1), § 404(a)(1) requires a "fiduciary" to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."

It is undisputed William Usher, Vice-President for Human Resources and Administration, was and is the designated Severance Plan Administrator; and therefore, pursuant to 29 U.S.C. § 1002(21) of ERISA, would be defined as a fiduciary with respect to BRI's Severance Plan to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets; ... (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21).

Craddock and Janousek

Mr. Craddock and Mr. Janousek, as employees of BRI, do not meet the definition of fiduciaries under ERISA, 29 U.S.C. 1002(21); however, based on plaintiffs' briefing, this Court assumes for the purposes of this Ruling only, that like the employees in Bodine, plaintiffs assert Craddock and Janousek "did not have managerial authority over the plan assets ... but their claims relate to a general

fiduciary duty of the employer, not the specific duties of a plan administrator." Bodine at 251. Therefore, under the holding of Bodine, for plaintiffs to be able to preserve their claim against Craddock and Janousek, plaintiffs are required to prove Craddock and Janousek engaged in "deceptive practices, misrepresentations," or other behavior typically associated with fiduciary breaches by employers under ERISA, as required by Varity Corp. v. Howe, 516 U.S. 489 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996); Bodine at 251.

It is undisputed Craddock and Janousek are not named fiduciaries under BRI's Severance Plan, nor are they fiduciaries as statutorily defined under ERISA. Plaintiffs assert, with respect to Craddock and Janousek, that although Burlington could require the employees to interview with Baker as a condition of their employment, it was unlawful under the ERISA fiduciary standards to hold "out the severance plan benefit as an inducement to get the employees to interview with Baker, when Craddock and Janousek knew that Executive Vice-President Limbacher had decided not to pay severance, and they themselves have arranged that result with Baker." Plaintiff's Supp. Brief, p. 3. Thus, "[a]n employer goes beyond its employer function and acts as an ERISA fiduciary, when it intentionally connects employment related statements with benefit related statements. Bodine at 12, citing Varity, supra." Plaintiffs Supp. Memo., p. 3.

Plaintiffs assert "Craddock and Janousek went beyond their 'employer function' by intentionally connecting employment-related statements (you must interview with Baker) with benefit-related statements (in order to eligible for severance benefits) and thereby incurred an ERISA fiduciary obligation to speak truthfully.... They violated that duty when they mislead the employees about the security of their benefits." Plaintiffs' Supp. Brief, p. 5.

Defendants assert:

> Janousek and Craddock did not breach their fiduciary duty when they told the employees [sic] would not qualify for severance under the DSB unless they interviewed with Baker Energy. Defendants' Brief in Support of Cross-motion for Summary Judgment; Doc.

> #98, pp. 4-8. Craddock's and Janousek's statements were not misrepresentations because they were true when made. As plaintiffs concede, Burlington had the right to instruct its employees to interview with Baker Energy. Plaintiffs' Supp. Brief at p. 3. Had those employees refused, Burlington could have fired them for cause thereby disqualifying them from benefits under the DSB. (DSB at § 2.1) That is, the Administrator could readily conclude that an employee who refused to comply with a directive to interview with Baker Energy, lost his job for cause or for unacceptable performance rather than because of the elimination of his position. BR's interpretation of the DSB to require employees to interview with Baker Energy was valid, and Janousek's and Craddock's statements based on that interpretation were true. Consequently, the two could not have violated their fiduciary duties.

Defendant's Response to Plaintiff's Supp. Memo, p. 3.

This Court agrees. BRI's Severance Plan does not require BRI to pay severance benefits unless and until a beneficiary employee does not receive a "Comparable Position"" in the outsourcing process, as defined under BRI's Severance Plan. Therefore, in the Burlington/Baker Outsourcing Transaction, without interviewing with Baker, a beneficiary employee would be unable to receive a "Comparable Position," the pre-requisite for determination of his right to severance benefits due under BRI's Severance Plan outsourcing provisions. Additionally, an employee's refusal to interview with Baker would also, under the terms of BRI's Severance Plan, disqualify an employee for benefits based on the terms which allow termination for either cause or unacceptable job performance.

Therefore, Craddock's and Janousek's statements to the employees were true; and accordingly, do not qualify as a "deceptive practice, misrepresentation or other behavior typically associated with fiduciary breaches by employers under ERISA" as required by the United States Supreme Court in Varity, supra. Although the end result

of the interview process may have been "Comparable Positions" were offered to some BRI employees, including plaintiffs, a failure or refusal of BRI employees to interview with Baker, as requested by Craddock and Janousek, could also have resulted in denial of severance benefits to BRI employees, based on other provisions of BRI's Severance Plan. Accordingly, there was no breach of fiduciary duty by Craddock and Janousek with respect to the statement made to BRI employees that they were required to interview with Baker Energy.

William Usher

As previously stated, it is undisputed that William Usher is a fiduciary as defined under both § 1104(a)(1) and § 1002(21). Plaintiffs assert the following against Mr. Usher:

> William Usher was Burlington's Vice-President for Human Resources and Administration and the designated Severance Plan Administrator. Usher was present when the operations group recommended that severance benefits be withheld, so as to foster operational continuity. (W. Usher Depo.; Exh. 6, pp. 51, 51.) Usher was told that as a member of the support group he should provide assistance to achieve that result. Usher's boss, Dan Hanower, Vice-President for Law and Administration, and General Counsel, Rick Plaeger, were present when that occurred. (Id. at p. 56.)
>
> As plan administrator, and as a member of the Benefits Review Committee, Usher denied the severance claims. The stated reason was participants received job offers which met the plan definition for comparable position. (Exh. 11, initial benefits denial letter.) This was merely an excuse to deny benefits, not the reason. According to Limbacher and Malson, the reason benefits were denied was the Company did not want employees to have severance pay which would allow them to take some time off, and perhaps seek work elsewhere rather than returning to work on the platforms.

> In denying benefits and in his capacity as Administrator, Mr. Usher failed to disclose, and by artful language, actively concealed that upper management had decided months before the lay-off to deny severance benefits for the Company's own interest, in order to further the out-sourcing scheme, and instructed him to assist in that endeavor.
>
> > Usher's alleged conflict of interest at that point should have been obvious. It was pointed out to him that if he was aware of or involved with the arrangement with Baker to interfere with severance benefits, he was in the untenable position of arguing his own conduct did not violate the law, and as Plan Administrator, deciding the issue.

Exh. 12, 7/20/2000 Letter to Benefits Review Committee; Plaintiffs' Memo. in Support, pp. 12, 13.

The Fifth Circuit in Martinez v. Schlumberger, Ltd., 338 F.3d 407 (5th Cir. 2003) discusses the conflict that arises when a fiduciary is also an employer, as in this case, and provides guidance to this unique situation. As the Supreme Court has noted, although a traditional trustee "is not permitted to place himself in a position where it would be for his own benefit to violate his duty to beneficiaries [u]nder ERISA ... a fiduciary may have financial interests adverse to the beneficiaries." Thus, employers "can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers, (e.g., firing a beneficiary for reasons unrelated to the ERISA Plan), or even as plan sponsors, (e.g., modifying the terms of a plan as allowed by ERISA to provide less generous benefits." Pegram v. Herdrich, 530 U.S. 211, 225, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000).

The Court in Martinez goes onto cite the "two hats doctrine" and cites the definition of fiduciary as previously referenced by this Court and contained within 29 U.S.C. § 1002(21)(a).

The Fifth Circuit further states:

> Therefore, in suits charging breach of fiduciary duty under ERISA, "the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan's beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to the complaint.'"

The Fifth Circuit in Bodine states as follows:

> The employee defendants contend and we agree that a decision to terminate an employee, who is also a plan beneficiary, is inherently not fiduciary in nature. *See* Hickman v. Tosco Corp., 840 F.2d 554, 567 (8th Cir. 1988) (defendant's decision to terminate employee rather than carry him on the payroll did not directly affect the administration of the plan).

This Court further finds enlightening footnote 6 which states:

> It is the nature of the acts taken by an employer - - not the intent behind them - - that determines in what capacity an employer acted. Long v. Excel Telecom Com., 1999 W.L. 1029088 at 2 (N.D. TX Nov. 9, 1999) (even if rational for firing was pretext for preventing plaintiff from exercising his stock options, the termination decision occurred in employer capacity, not fiduciary capacity.)

In this case, BRI sought, and has admitted they sought, continuity for their offshore business through the "B&B outsourcing" transaction. Therefore, under the holding of Bodine, this Court is directed to address the "nature" of the acts taken by the employer, BRI. In this case, BRI sought to maintain continued employment for their employees, and continuity for their business, and thus, to further, not only BRI's business interests, but also, the interest of their employees and, also, the BRI Severance Plan, which this Court assumes impacted

not only the plaintiffs, but also, other BRI employees. Therefore, if in Bodine, failure to terminate an employee, and thus, deny the employee Enhanced Benefits, would not be a violation of a fiduciary duty under ERISA; Burlington's actions as to its outsourcing plaint and the continuing employment to its employees, which ultimately resulted in a failure of the employees to meet the requirements, under the terms of BRI's Severance Plan, for severance benefits should not constitute a breach of the fiduciary duty owed under ERISA. Mr. Usher was acting in his capacity as an employer and not an ERISA fiduciary when he acted, notwithstanding the end result being the failure of certain employees to meet the Plan requirements for benefits.

Therefore, this Court finds the actions of William Usher do not constitute a breach of fiduciary duty pursuant to 29 U.S.C. § 1104. Accordingly, this Court finds in favor of Burlington Resources, Inc., DENYING plaintiffs' claims of breach of fiduciary duty in their entirety pursuant to 29 U.S.C. § 1104.

Twenty-nine U.S.C. 1132(c)

Plaintiffs, also, have asserted a claim for penalties for the alleged breach of fiduciary duty by Usher, Craddock, and Janousek, and have sought statutory penalties of $100.00 per day as described in 29 U.S.C. § 1132(c). As this Court has found no breach of fiduciary duty on the part of William Usher, Plan Administrator, or Craddock and Janousek as BRI Management, this Court finds no basis to address plaintiffs' claims for penalties pursuant to 29 U.S.C. § 1132(c). Accordingly, this Court also DISMISSES plaintiffs' claims pursuant to 29 U.S.C. § 1132(c).

THUS DONE AND SIGNED this 22nd day of July, 2004.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHEMWELL, CLERK
DATE: 7/23/04
BY: MS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DWAYNE BELAIRE, ET AL	CIVIL ACTION NUMBER: 01-0786
VERSUS	JUDGE DOHERTY
BURLINGTON RESOURCES, INC.	MAGISTRATE JUDGE METHVIN

ORDER

Considering the foregoing Memorandum Ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this Court finds in favor of Burlington Resources, Inc. and Burlington Resources, Inc. Discretionary Severance Benefit Plan, DISMISSING in its entirety plaintiffs' claims pursuant to 29 U.S.C. § 1140, 29 U.S.C. § 1104 and 29 U.S.C. § 1132(c).

Counsel are to submit a joint Judgment reflecting this Court's Ruling herein within ten (10) days of receipt of this Order.

Lafayette, Louisiana this 22nd day of July, 2004.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHEMWELL, CLERK
DATE: 8/11/2004
BY: MS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE - OPELOUSAS DIVISION

DWAYNE BELAIRE, ET ALS Plaintiffs	CIVIL ACTION
	NO. CV01-0786-LO
VERSUS	
	JUDGE DOHERTY
BURLINGTON RESOURCES, INC., and BURLINGTON RESOURCES, INC. DISCRETIONARY SEVERANCE BENEFIT PLAN Defendants	MAGISTRATE JUDGE METHVIN

FINAL JUDGMENT

In accordance with (A) the Order finding in favor of Defendants and dismissing Plaintiffs' claims under Burlington Resources Inc.'s "Change in Control Employee Severance Protection Plan" entered on April 6, 2004 and (B) the Order finding in favor of Defendants and dismissing Plaintiffs' claims under Burlington Resources Inc.'s "Discretionary Severance Benefit Plan" entered on July 22, 2004,

IT IS HEREBY ORDERED that judgment is entered for Defendants on all claims asserted in this litigation and that Plaintiffs take nothing by reason of this suit.

This is a FINAL JUDGMENT entered in accordance with Rule 54(a) of the Federal Rules of Civil Procedure.

Signed at Lafayette, Louisiana, this 10th day of August, 2004.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

BRINEY & FORET

By:/s/ Christopher L. Zaunbrecher
Christopher L. Zaunbrecher (#09546)
413 Travis Street
Post Office Drawer 51367
Lafayette, Louisiana 70505-1367
Telephone: (337) 237-4070

ATTORNEY FOR PLAINTIFFS,
DWAYNE BELAIRE, ET ALS

THE ONEBANE FIRM

By:/s/ Greg R. Mier
Greg R. Mier (#24561)
P. O. Box 3507
Lafayette, LA 7502
Telephone: (337) 237-2660

LOCAL COUNSEL FOR DEFENDANTS,
BURLINGTON RESOURCES, INC. AND
BURLINGTON RESOURCES, INC.
DISCRETIONARY SEVERANCE BENEFITS PLAN

AKIN GUMP STRAUSS HAUER & FELD LLP

By: /s/ Fraser A. McAlpine

Fraser A. McAlpine (#3407)
Kevin J. White (#32407)
1111 Louisiana Street, 44th Floor
Houston, Texas 77002
Telephone: (713) 220-8129

ATTORNEY IN CHARGE FOR DEFENDANTS,
BURLINGTON RESOURCES, INC. AND
BURLINGTON RESOURCES, INC.
DISCRETIONARY SEVERANCE BENEFITS PLAN

No. 05-268

Supreme Court, U.S.
FILED
SEP 22 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DWAYNE BELAIRE; JOHN BELCHER; WADE BONDS; BOBBY W. BUTLER; CLARENCE E. CANNON, ET AL.,

Petitioners,

v.

BURLINGTON RESOURCES, INC., BURLINGTON RESOURCES, INC. DISCRETIONARY SEVERANCE BENEFIT PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

FRASER A. MCALPINE
State Bar No. 13321300
AKIN GUMP STRAUSS HAUER & FELD LLP
1111 Louisiana Street, 44th Floor
Houston, Texas 77002
(713) 220-8129 (Telephone)
(713) 236-0822 (Facsimile)

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

Petitioners are:

Ricky Anderson
Dwayne J. Belaire
John Belcher
Wade Bonds
M. David Broussard
Bobby W. Butler
Frank Cali, Jr.
Clarence E. Cannon
Ricky Clark
Steve Courville
Lester Dufour
Wayne Duhon
Whitney L. Duplantis
Alan Garza
Allen D. Gaspard
Eldon Hansen
Timothy M. Harris
Jayson Hebert
Darron Hodge
Eric Lanza
Michael Lavan
Michael Lirette
Kurt Lirette
Jimmy Marcel
John Scott Martin
James Mason
Robert P. Mayer, Jr.
Walter McDougle
Leland Meche
Michael Neveu
Rodney Prince
Boyd Raborn, Jr.
Doug Renard
Craig Rhodes
Frederick W. Richard
James Saddler
Hayward Sedotal
Ralph Segura
James Smith
Bryon Tauzin
Dannie Vincent
Jerry Williams
Mark Wilson
Allen York

Respondents are:

Burlington Resources, Inc.
Burlington Resources, Inc. Discretionary Severance Benefit Plan

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the United States Supreme Court, Respondents disclose the following:

1. Burlington Resources Inc. is a publicly traded corporation. Burlington Resources Inc. has no parent corporation.

2. Capital Research Management Company owned directly or beneficially approximately 10.8 percent of the common stock of Burlington Resources Inc. as of February 2005. Capital Research Management Company is affiliated with The Capital Group Companies. Burlington Resources Inc. understands that The Capital Group is privately owned.

3. Burlington Resources Inc. Discretionary Severance Benefit Plan is an employee welfare benefit plan sponsored by Burlington Resources Inc., and that benefit plan has no parent corporation.

STATEMENT OF THE CASE

Petitioners are former employees of Burlington Resources who did not receive severance benefits because they did not qualify for those benefits. In the course of an outsourcing program, each Petitioner received and accepted an offer of a "comparable position" from Burlington Resources' outsourcing partner. Under the terms of the applicable severance plan, that offer made the Petitioners ineligible for severance benefits. In essence, Petitioners did not receive severance because they kept their jobs.

Petitioners concede that they did not qualify for severance benefits. Instead they brought suit because Burlington Resources encouraged its outsourcing partner to extend offers that were "comparable" within the meaning of the severance plan. It is undisputed that Burlington Resources encouraged its outsourcing partner to make comparable offers in order to achieve operational continuity (*i.e.*, Burlington Resources wanted Petitioners to keep their jobs). Petitioners nevertheless allege that this encouragement violates Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, which prohibits "any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ."

The Fifth Circuit held that there was no actionable interference by Burlington Resources. The Court also held that, "[a]bsent any showing of deceptive practices, misrepresentations, or other untoward acts," Petitioners failed to demonstrate a claim for breach of fiduciary duty. (Fifth Circuit Opinion at 4.)

ARGUMENT

Petitioners seek review of the Fifth Circuit's unpublished *per curiam* opinion, asserting that it conflicts with prior rulings of the Fifth Circuit. (Petition at 11, 18-19.) The Fifth Circuit, however, denied a Petition for Rehearing En Banc, with no judge requesting that the court be polled. Accordingly, the Judges of the Fifth Circuit apparently did not perceive an intra-circuit split.

Petitioners also state that the Fifth Circuit's decision conflicts with decisions of other Circuits. Petitioners, however, do not demonstrate that any such conflict exists; they neither identify another federal circuit that disagrees with the Fifth Circuit nor specify the point of law in dispute. They have also failed to demonstrate that the Fifth Circuit's unpublished opinion affects the interests or rights of any person not a party to this case.

The remaining basis for Petitioners' application is their contention that the Fifth Circuit's decision conflicts with two decisions of this Court. Petitioners claim that the Fifth Circuit's decision on their Section 510 claim conflicts with the holding in *Intermodal Rail Employees Association v. Atchison, Topeka & Santa Fe Railway Co.*, 520 U.S. 510 (1997), and that the ruling on their breach of fiduciary duty claim conflicts with *Varity v. Howe*, 516 U.S. 489 (1996). As shown below, there is no such conflict and accordingly this case does not involve any unsettled questions of federal law of general interest.

Intermodal concerned a motion to dismiss a complaint for failure to state a claim. The Court held that the complaint stated a cause of action under Section 510 because it alleged that the defendant-employer's decision to discharge the plan participants was motivated by a desire to

prevent their pensions from vesting. This Court further held that Section 510 prevents a discharge decision motivated to prevent the attainment of welfare benefits even though welfare benefits do not "vest."

In this case, Petitioners did not and of course could not allege that Burlington Resources discharged them to prevent them from receiving severance benefits. Nor did they demonstrate that they were fined, suspended, expelled, disciplined or discriminated against within the meaning of Section 510. Nothing in *Intermodal* eliminates the element of proof requiring "unscrupulous conduct" or adverse action within the meaning of Section 510. *Bodine v. Employers Casualty Co.*, 352 F.3d 245, 250 (5th Cir. 2003). Arranging for continued employment on comparable terms is not conduct prohibited by Section 510 because it is not in the nature of a discharge, a fine, expulsion, discipline or discrimination.

Consistent with *Intermodal*, the Fifth Circuit focused on the employer's motivation and purpose, and not whether the severance benefits were "vested." The Fifth Circuit concluded that Burlington Resources' purpose was to ensure Petitioners' continued and uninterrupted employment. Consistent with *Intermodal*, when an employer is making "fundamental business decisions, such actions are not barred by § 510." 520 U.S. at 516. Section 510 does not interfere with an employer's interests in operational continuity. Accordingly, the Fifth Circuit's decision in this case does not conflict with *Intermodal*.

Nor does the Fifth Circuit's decision conflict with *Varity v. Howe*, 516 U.S. 489 (1996). To the contrary, the Fifth Circuit adopted the analysis and conclusion provided by the District Court in rejecting the breach of fiduciary

duty claim, and the District Court expressly relied on *Varity*. (District Court Opinion at 13-14.)

In *Varity*, the employer tricked its employees to withdraw from one set of benefit plans and to forfeit their benefits. The employees sued to redress the harm caused by the significant and deliberate deception. This Court held that a plan fiduciary violates its duties when it "participate[s] in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense." 516 U.S. at 490. The Court then held that Section 502(a)(2) of ERISA permits equitable relief to remedy the harm caused by a breach of fiduciary duty.

Burlington Resources, however, did not deceive anyone. Indeed, the statements challenged by Petitioners were true. Burlington Resources told the affected employees that they were required to interview with the outsourcing partner, and that they would be disqualified for severance benefits if they refused to interview. Because those statements were true, they could not constitute a "deceptive practice, misrepresentation, or other behavior typically associated with fiduciary breaches by employers under ERISA." (District Court Opinion at 14, *quoting*, *Varity*, 516 U.S. at 489.)

Nor did the true statements harm anyone. Burlington Resources told its employees in writing that it expected that there would be high retention rates, and reminded them in writing that a comparable offer would disqualify them under the terms of the severance plan. In other words, Burlington Resources was candid about its expectation that most of the employees would be hired by the outsourcing partner and not receive severance benefits. The essence of Petitioners' claim is that Burlington Resources

had a fiduciary obligation to inform the employees that it had encouraged its outsourcing partner to extend offers that were comparable, and that this omission was misleading. Petitioners, however, offered no proof that anyone was misled or otherwise was induced to act or forbear. Absent some evidence that Burlington Resources misled anyone and induced an adverse change of position, the holding that Petitioners failed to establish a right to redress for a breach of fiduciary duty is both correct and consistent with *Varity*.

CONCLUSION

Petitioners fail to demonstrate that their petition concerns any unsettled questions of federal law. The Fifth Circuit's holding in this case does not conflict with governing Supreme Court precedent. Accordingly, Respondents submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

FRASER A. MCALPINE
State Bar No. 13321300
AKIN GUMP STRAUSS HAUER
& FELD LLP
1111 Louisiana Street,
44th Floor
Houston, Texas 77002
(713) 220-8129 (Telephone)
(713) 236-0822 (Facsimile)

Attorney for Respondents